1973

# C.R. Owens Trucking Corporation v. Harold Stewart : Respondent's Brief

Utah Supreme Court

# IN THE SUPREME COURT
# of the
# STATE OF UTAH

C. R. OWENS TRUCKING CORPORATION,

Plaintiff and Appellant

vs.

HAROLD STEWART,

Defendant and Respondent

Case No. 12[illegible]

## RESPONDENT'S BRIEF

Appeal from the Judgment of the Fifth District Court of Millard County, State of Utah. Honorable [illegible] Burns, Judge.

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AUTHORITIES

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C. R. OWENS TRUCKING CORPORATION,

Plaintiff and Appelant

vs.

HAROLD STEWART,

Defendant and Respondent

CASE No. 12988

## BRIEF OF RESPONDENT

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## STATEMENT OF FACTS

The entire voir dire of the jury panel (Tr. 2 through 29) contains essential facts for proper consideration of this appeal.

The entire "insurance" incident, as reflected in the transcript (Tr. 30 - 31) is important, and for convenience we quote the transcrip as follows:

> "A Yes. Well, we had to bring another truck down and we thought maybe we'd switch the

load but then we decided that the frame w
bent. We never did get it back together aga
when it came apart, we had experience with th
before so we decided we'd have to get it back
on its own power, so we put new bearings in
then we took it up to our shop in Roy and wa
ed. I talked to Mr. Stewart's insurance man a
he indicated that he was going to take care
it at the time and—

THE COURT: Just a moment.

MR. ALSUP: Your Honor, I am sorry

THE COURT: Let me say this to yo

Mr. Owens, just answer the questions that a
asked of you, don't volunteer.

THE WITNESS: All right.

MR. ALSUP: There is no insurance i
volved in this case, your Honor, may we mak
that clear?

THE COURT: Well, let me say this
you, members of the jury, you have two stat
ments regarding insurance, you are to disr
gard both of them. Whether or not there is a
insurance in this lawsuit or any lawsuit is
no materiality to the jury, disregard it and yo
are so instructed. Now you may proceed."

The defendant's insurance policy did not exceed th
prayer of the complaint, but this isn't important. Wha
is important is that he did in fact have insurance.

With these additions, we accept plaintiff's statement of facts.

## ARGUMENT

### POINT I

### THE COURT DID NOT ERR IN RULING ON MOTIONS RAISED BY THE "INSURANCE".

#### STATEMENT

We are not certain just what relief plaintiff requested of the trial Judge. We don't see any motion from the plaintiff in the transcript. Nonetheless, we assume that plaintiff intended to move the Court for a mistrial, based upon the statement made by defendant's attorney concerning insurance. This assumption is based upon the proceedings taken before the Court in the absence of the jury, and reported at page 2, 3 and 4 of the second reporter's transcript, dated January 23, 1973. At this hearing the Court took the question raised by plaintiff under advisement and invited plaintiff to submit authority. None was submitted. The judgment on the verdict was permitted to stand, and so we assume that we deal here with a motion for mistrial by plaintiff and a denial thereof by the Court and an assignment of error thereon by the plaintiff.

The undersigned, who was defendant's counsel and who made the questioned statement concerning insurance, does not seek to justify that statement. Admittedly, the statement as contained in the transcript is not what I thought I said, and certainly not what I intended saying; but obviously it is what I did say. The error,

from the lawyer's standpoint, is not just what was said, but rather, it is that anything at all was said, other than asking the Court to admonish the jury to disregard the inference of insurance created by plaintiff's statement. Therefore, any attempt to justify the statement would merely compound the blunder.

The important question on this appeal, however, is whether or not the Court committed error in its handling of the problem created. What the Court did is reported at page 31 of the transcript, and we quote:

> "THE COURT: Well, let me say this to you, members of the jury, you have two statements regarding insurance, you are to disregard both of them. Whether or not there is any insurance in this lawsuit or any lawsuit is of no materiality to the jury, disregard it and you are so instructed. Now you may proceed."

Without justifying any statement made by or on behalf of either party, and without quarrelling with any of the authorities cited by plaintiff in his Brief, we submit that the jury, if at all interested in the question, would be just as inclined, or more inclined, to conclude from the statement and the counter-statement that there was insurance, rather than that there was no insurance; and in any event the Court properly handled the matter with its cautionary admonition.

In urging that there was no reversible error involved in the incident, we do not ask the Court to endorse the defendant's method of handling the insurance problem as a model. We only say that in this particular case, con-

sidering what was said on both sides, and then reviewing the conduct of the trial Judge in seeking a fair trial, there was no reversible error.

## POINT II

## THE COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR A CHANGE OF VENUE.

Prior to the trial, plaintiff moved for a change of venue on the ground that a fair trial could not be had in Millard County. He moved the Court for a transfer to Weber County, where he resides. The substance of plaintiff's complaint was and is that in a rural livestock area of relatively limited population, a fair jury could not and cannot be had because most juries have some acquaintanceship with the defendant, and would, like defendant, be engaged in some phase of the livestock business.

No affidavit was filed with this motion made by the plaintiff, and no evidence was offered to support it.

Since some factual foundation is required for any court action, and since none was presented by the plaintiff in support of his motion for change of venue, the court was asked by the plaintiff to say that presumptively the people of Millard County are so prejudiced against outsiders that a fair trial there is not possible. Reduced to the facts of this case, the court was asked by plaintiff to say: In a case involving damage allegedly caused by a cow on the highway and defective fencing, the people of Millard County, Utah being livestock people predominantly and having some acquaintanceship with defendant

by reason of the limited population in the area, are p
judiced in favor of the defendant. Therefore, a fair tr
by a jury in Millard County is impossible.

This is an awful indictment against not only a co
munity of people, but also against our jury system. T
integrity of our jury system is just not that tenuo
Nothing in our years of working under that system—
in our human experience—tells us that man is so d
honest or so weak as to be influenced to the point of
tive prejudice by any casual acquaintance or any remo
business interest.

We who are so sensitive—we who scream in mor
anquish at the mere mention of the word "insuranc
for example—do great injustice to the system. The tru
is, people are basically decent and honest. When a pro
lem is put to them they make an honest, sincere effort
reach a fair solution. They do this without regard
inconsequential considerations and local influences.

A person's right to a trial in his own community
important to him. It is important enough to warrant
constitutional guaranty (Utah Constitution, Article XI
Sec. 1). A court should give fair consideration to fa
showing proper reason for a change of venue. But lo
venue should not be lightly regarded. There are so ma
reasons for a local determination of controversies. H
wrong it would be to say to a people of a community th
any case brought against any one of you by a non-re
dent must be tried outside your community, at additio
expense and at inconvenience to you, because you

raise cattle here and you all have some acquaintance with each other. In a case like ours, the condition of the fence is very important to the fact trier. You can show a jury photographs of a fence in a distance county, or you can, under proper direction, take a jury out and show it the fence. Which is the better evidence? Pictures can be distorted and can be so misleading. The most reliable evidence is the actual view, and this requires a local trial. Our search always is for the truth, and absent facts showing actual bias, truth can best be arrived at through local trial. This is why our jury system works quite well.

In any event, the question in our case comes down to this, as it does in all these cases involving this question: Does the record in this case reflect any basic unfairness? We refer to the examination of the jury panel by the trial Judge, as shown in the transcript, pages 2 to 29, inclusive. We submit this record discloses:

1. A careful conduct of the voir dire by the trial Judge, with a sincere effort toward fairness, and certainly no discretionary abuse; and

2. A jury panel, after dismissals for cause by the court, that evidenced a desire and an ability to perform the jury function.

All cases on this subject say about the same thing: the trial Judge is to be supported unless his ruling shows an abuse of his discretion of such a nature as to prevent a fair trial for the complaining party.

The opinion in *Chamblee v. Stocks,* 9 *Utah* 2*d* 342,

334 *Pac.* 2d 980, expresses this doctrine of fairness as well as any case, and factually it is as close to our case as any we find. This case factually is superior from the plaintiff's standpoint to our present case, since at least there is in the Chamblee case a factual basis given by affidavit for the Court to act. We rest our argument, without formal conclusion, upon this decision and on the voir dire of the jury, pages 2 through 29 of the transcript. For convenience we reproduce the pertinent portion of the opinion in Chambless v. Stocks, as follows:

> "The motion for change of venue was filed and argued long before trial and was based on an affidavit which, in the words of plaintiff's brief, 'set forth * * * the fact that the defendant, John Stocks, was an elected official * * *, that he was a member of one of the oldest families in Moab and Grand County, and had many friends in the community, and that *because of his official position, relatives and friends* * * * it would be impossible to have an impartial trial.' (Emphasis added.)
>
> "Change of venue generally is discretionary and absent a clear abuse thereof a trial court's order denying or granting it will not be disturbed. With nothing more than facts reflected in the language quoted above, a trial court would not abuse its discretion, in our opinion, by denying the change. The wisdom of the Court's denial here quite clearly was established when the jurors were questioned for cause shortly

before they were sworn. At that time, although all knew or knew of the sheriff, and some were acquainted with him, none evinced any disposition to try the case other than fairly, on the evidence, and under instructions of the trial court, — except possibly two prospective jurors, — one of whom, although admitting embarrassment to act as venireman, acknowledged an ability to transcend it, — he being eliminated by the plaintiff's peremptory challenge, and the other for cause on motion of defendant. It would not be consonant with our traditional judicial procedure or complimentary to our jury system to deny a man trial by jury of his neighbors because he happened to be an official, and had friends and relatives in the community. * * * "

Respectfully submitted,

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